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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD – REGION 20

SAN RAFAEL HEALTHCARE AND WELLNESS, LLC and NATIONAL UNION OF HEALTHCARE WORKERS	NLRB Case No.: 20-CA-204948

RESPONDENT'S REPLY TO THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S EXCEPTIONS

I. INTRODUCTION.

Counsel for the General Counsel ("GC") urges the Board to adopt the Administrative Law Judge's ("ALJ") decision that Respondent's ADR Policy ("Policy") violates Section 8(a)(1) of the National Labor Relations Act ("NLRA" or "Act"). To support this, the GC, like the ALJ, relies on inconsistent positions that contradict established interpretive principles and misconstrue Board precedent. However, interpreting the Policy as a whole, and reading its coverage and class waiver provisions together with the unqualified and conspicuous exclusion for Board charges, the only possible reasonable interpretation is that Board charges are exempt from the Policy. Moreover, any purported potential infringement would be slight given that the Policy not only expressly excludes Board charges, but provides an alternative forum in which to vindicate those rights. Such a slight potential impact is far outweighed by the Policy's substantial business interests. Accordingly, the Policy does not violate the Act, and Respondent's exemptions should be granted.

II. ANALYSIS.

A. *Boeing* Overturned *Lutheran Heritage* And, By Extension, *U-Haul* And Its Progeny.

The GC concedes *U-Haul* and its progeny applied *Lutheran Heritage*'s now defunct reasonably construe test to analyze the legality of mandatory arbitration policies. GC Br. at 1 ("whether the Board continues to apply the *Lutheran Heritage* analysis...as it did in *U-Haul*). Curiously, though, despite this admission, he also contends the "extension of *Boeing* to mandatory arbitration policies is not a foregone conclusion." *Id.* *Boeing* directly belies this contention. In *Boeing*, the Board unequivocally, and without qualification, "overrule[d] the *Lutheran Heritage* reasonably construe standard." *Boeing*, 365 NLRB No. 154, slip op. at 7 (2017). Nothing in *Boeing* even remotely suggests the new standard only applies to certain rules, but not others. To the contrary, the Board made clear its intent that the new standard apply to ***all*** facially neutral workplace policies by stating "Under the new standard we adopt today, when evaluating a facially neutral policy, rule, or handbook provision..." *Id.*, slip op. at 3.

To support his erroneous claim, the GC cites *Boeing* footnote 51, arguing it proves the Board did not overturn "settled law articulated in *U-Haul*." GC Br. at 1. However, the "law

articulated in *U-Haul*," as the GC admits, was *Lutheran Heritage*'s reasonably construe standard, the standard expressly overruled by *Boeing*. *Id.* *Boeing*'s footnote 51, which states, in part, "we do not pass on the ***legality of the rules*** at issue in past Board decisions," merely acknowledges the Board has not yet had occasion to reevaluate every type of rule it previously considered. *Boeing*, supra at 12, fn. 51. Moreover, the GC conveniently ignores the very next sentence in this footnote, "In future cases, the legality of such rules will turn on the principles set forth in today's decision." *Id.* Accordingly, *Boeing* specifically instructs that rules previously evaluated under *Lutheran Heritage*, such as mandatory arbitration policies, must be reevaluated under *Boeing*. *Id.* Accordingly, *U-Haul's* analysis, rationale, and holdings (as well as those of its progeny) are now invalid.

B. The ALJ's Interpretation, Which The GC Urges The Board To Adopt, Contradicts Established Interpretive Principles.

Importantly, the ALJ did not find, nor does the GC contend, that the language of the exclusion itself is incomprehensible or necessitates expert legal knowledge to decipher. Rather, the ALJ's interpretation[1] relies entirely on other purportedly contradictory Policy provisions and the exclusion's placement and standard font[2] to find the exclusion ambiguous. However, the ALJ's interpretation, and the GC's contentions, improperly ignore basic, uncontroversial interpretative principles long established and consistently applied by the Board to determine what a reasonable employee would understand a facially neutral policy to mean. *See, e.g., Lafayette Park Hotel*, 326 NLRB 824, 825 (1998); *Lutheran Heritage*, 343 NLRB 646, 647 (2004); *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 5 (2015).

1. The Policy Cannot Be Reasonably Interpreted To Restrict Board Charge Filings.

Pursuant to these fundamental interpretative principles, when reasonably interpreting a workplace policy, the policy must be read as a whole. *Lutheran Heritage*, supra at 647;

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[1] Throughout his Brief, the General Counsel cleverly, but erroneously, characterizes the ALJ's purportedly reasonable interpretation as a factual finding. This tactic is no doubt a subtle attempt to compel the Board's deference to the ALJ's fatally flawed legal conclusion. However, what constitutes a reasonable interpretation is a legal conclusion, not factual finding. Thus, the Board must review the ALJ's interpretation *de novo*.

[2] As noted below, the attempt to attack the font is flawed at best, if not disingenuous, as the font of the plainly worded exclusion is of the same style and size as the language the General Counsel asserts is potentially misleading.

SolarCity Corp., supra, slip op. at 5. Provisions "crafted to be read together" cannot be interpreted in isolation, completely divorced from the inextricable limitations imposed by other provisions. *Lundry's Inc.*, 362 NLRB No. 69, slip op. at 3 (2015); *SolarCity Corp.*, supra, slip op. at 5. Rather, "a fair effort must be made to give each its intended meaning" by examining general pronouncements in context with language limiting their scope and breadth. *Lundry's Inc.*, supra, slip op. at 3 (2015); *SolarCity Corp.*, supra, slip op. at 5. If the purported ambiguity only arises from "parsing the language of the rule" and "viewing [the provision] in isolation," this strained construction must be rejected as unreasonable. *Lafayette Park Hotel*, supra at 825. Thus, if two provisions can be interpreted two different ways – one which would render them inconsistent and the other which would reconcile them – the interpretative principles sanctioned by the Board mandate the latter be adopted. *Lundry's Inc.*, supra, slip op. at 3; *SolarCity Corp.*, supra, slip op. at 5.

Applying these principles, the Policy cannot be reasonably interpreted to restrict an employee's right to file a Board charge. Although the coverage clauses set forth in the "Who is Covered by the Policy" and the "Covered Disputes" sections generally refer to employment-related disputes, this language must be read in context with the exclusion for Board charges. In fact, the exclusion's introductory language – which states "Nothing in this policy is intended..." – signals to the reader, in plain and unambiguous language, that the exclusion is inextricable linked to the preceding coverage clauses and must be read in conjunction with them. When read together, as the language plainly indicates they should, the only reasonable interpretation is that the exclusion limits the scope and breadth of the coverage clauses by exempting Board charges from the arbitration mandate.

The same reasoning applies to the "Class Action Waiver" section. The GC argues, when read in isolation, a reasonable employee could read this section as a prohibition on Board charges seeking to vindicate a collective concern. However, when read in context with the subsequent absolute and unambiguous exclusion for Board charges, as the exclusion's introductory language indicates the reader must, employees would reasonably understand Board charges are excluded from the prohibition on representative or collective claims.

Of course, that the Policy repeatedly refers to "the court system," "courts," "lawsuits," "litigation," and "those types of employment disputes" further emphasizes that it is employment lawsuits which are subject to arbitration while the exclusion makes it abundantly clear that NLRB charges are not.

a. **The ALJ's Interpretation Improperly Parses The Language And Construes Provisions Crafted To Be Read Together In Isolation.**

The GC urges the Board to adopt the ALJ's isolationist interpretation of the coverage clauses, arguing rank-and-file employees would read the "expansive" and "absolute" coverage clauses to encompass claims arising under the Act. GC Br. at 2. However, this construction completely disregards the subsequent, more specific and absolute exclusion for Board charges. This approach also directly contradicts the Board's sanctioned interpretative principles, which instruct provisions "crafted to be read together" must be read as a cohesive whole, i.e., the general coverage clauses read in the context of the specific exclusion for Board charges. *Lutheran Heritage*, supra at 647; *Lundry's Inc.*, supra, slip op. at 3; *SolarCity Corp.*, supra, slip op. at 5. When read together, the only reasonable interpretation is that Board charges are excluded from the any arbitration mandate. Because the ALJ's interpretation parses related Policy provisions, construes them in isolation, and ignores unambiguous language intended to limit the scope of the coverage and class action sections, the Board should reject the ALJ's interpretation as unreasonable.

To circumvent the fatal impact of the Board's established interpretative principles, the GC attacks these principles as legalistic cannons of construction irrelevant to a reasonable employee's understanding of the Policy.[3] However, the Board has expressly applied these principles when determining how a reasonable employee would read facially neutral policies. Indeed, these fundamental cannons of construction not only predate *Lutheran Heritage*, but have been consistently reaffirmed by the Board in subsequent decisions, including in cases relied upon

[3] The General Counsel also *falsely* alleges "Response has cited no authority whatsoever" to establish these principles apply when reasonably interpreting a workplace policy from a reasonable employee's perspective. GC Br. at 9. This is patently untrue. Respondent cited ample authority supporting its position and has done so in its Reply Brief as well. Resp. Br. at 11-14.

by the GC to advocate for the ALJ's untenable interpretation. *Lafayette Hotel*, supra at 825; *SolarCity Corp.*, supra, slip op. at 5.

2. The ALJ's And GC's Contentions Regarding The Exclusion's Position, Font And Heading Do Not Diminish Its Efficacy.

In advocating for the ALJ's interpretation, the GC characterizes the exemption's placement as "obscure" and "out-of-the-way." GC Br. at 3. However, its location in a standalone paragraph at the end of the Policy ensures employees understand none of the proceeding provisions restrict employees' right to file Board charges. If the exclusion was subsumed into another section, like the "Covered Dipsutes" section, employees could be left wondering whether the exclusion applies equally to subsequent sections, like "The Arbitration" and "Class Action Waiver" sections. Indeed, this is precisely what the Board in *Lincoln Eastern* found. *Lincoln Eastern*, 364 NLRB No. 16, slip op. at 3 (2016). Placement at the end of the policy, coupled with the introductory language signaling that the exclusion applies to all proceeding provisions, cures any potential ambiguity by ensuring employees understand none of the preceding provisions restrict Board charges.

Moreover, the ALJ's and GC's contentions unreasonably presume employees will not read the entire policy or will only read provisions set apart by specialized font.[4] In fact, the coverage and class action waiver sections are no more conspicuous or emphasized than the Board charge exclusion. It simply defies logic to presume an employee would read the covered claims or class waiver sections and believe they restrict Board charges, but would not give equal weight and consideration to the exclusionary language with the same font.

Not surprisingly, neither the ALJ nor the GC cited to a single case finding unlawful a plain English exclusion located in a standalone paragraph dedicated solely to describing the types of claims exempt from mandatory arbitration. Rather, in all of the cases relied on by the ALJ and the GC, the Board found the exclusion insufficient because it was drafted in complicated legalize incomprehensible to the average employee with no legal training, included

[4] To further this position, the General Counsel cited to a provision in all capital letters in the "Who Is Covered" section. However, this section merely identifies who is covered by the policy. The provisions that set forth the covered claims are the exclusion and the "Covered Disputes" and "Class Action Waiver" sections.

in the same paragraph as language suggesting the right to file Board charges is futile, or both. *SolarCity Corp.*, supra, slip op. at 5 (the exclusion drafted in complicated legalize that required "specialized legal knowledge"); *Ralph's* Grocery, 363 NLRB No. 128, slip op. at 2 (2016) ("language in the ***same paragraph*** [as the exclusion for Board charges] dictates that the dispute must nonetheless be resolved through arbitration per the policy"); *Lincoln Eastern*, supra, slip op. at 3 (exclusion for Board charges included in the same lengthy paragraph as language suggesting all disputes must ultimately be resolved through arbitration); *Bloomingdale's, Inc.*, 363 NLRB No. 172, slip op. at 4-5 (2016) (exclusion for "claims...under the National labor Relation Act...insufficiently clear" and buried in the same paragraph as other legalistic exclusions incomprehensible to layperson.) The exclusion here suffers from none of the defects that led the Board in prior cases to conclude the exclusion did not sufficiently preserve the right to file Board charges.

The ALJ and the GC also take issue with the "Severability" heading proceeding the exclusion. However, neither the ALJ nor the GC cite to a single case that held such a heading renders an absolute, unqualified exclusion ambiguous. Perhaps more importantly, the ALJ's finding, and the GC's contention, ascribes a particularized, legalistic definition to "severability" known only to lawyers, but the ordinary, dictionary definition of "severability" simply means "the quality or state of severable," i.e., "capable of being severed." Webster's Seventh New Collegiate Dictionary, p. 795, col. 1 (7th ed.). Applying its ordinary meaning, rather than the legalistic definition ascribed by the ALJ and the GC, this heading is entirely appropriate because the exclusion identifies claims exempt from the general arbitration mandate.

3. The GC Makes Several Arguments That Unreasonably Assume Employees Possess Sophisticated Legal Knowledge.

The GC also raises several arguments wholly at odds with his contention that reasonable employees do not possess legal expertise. First, the GC reproaches the exclusion for using the term "charges" rather than the broader term "claims," arguing this would confuse employees as to whether they could obtain relief through Board proceedings or are merely entitled to file a charge. Ironically, the GC's argument is self-defeating as this presumes employees would

understand the legal intricacies of Board procedure and federal appellate court process. A legally unsophisticated employee would assume that if, as the exclusion states, he has the absolute, unqualified right to initiate Board proceedings by filing a charge, he can also obtain relief through those proceedings.[5] Moreover, the last sentence in the exclusion states only "claims that cannot be resolved through administrative proceedings shall be subject to the procedures of this Policy." Contrary to the GC's twisted reading, a reasonable reading actually resolves any allegedly lingering ambiguity because "claims resolvable through administrative proceedings" obviously includes Board charges.

4. The Policy's Articulated Goal To Avoid Traditional Court Litigation Bolsters The Exclusion For Board Charges.

Relying on *U-Haul*, the GC dismisses the other language in the Policy indicating that it only applies to traditional court litigation. However, *U-Haul* did not include an express exclusion for Board charges like the Policy here does. *U-Haul Co. of California.*, 347 NLRB 375, 377 (2006). Moreover, contrary to the GC's contention, the Board in fact recognizes that a general statement of "goals and objectives" will impact how employees will read a policy. *Copper River of Boiling Springs, LLC*, 360 NLRB 459, 471 (2014) (statement of goals and objectives could...amount to 'limiting language' which prevented employees from concluding that an unclear rule restricted the exercise of their Section 7 rights.")

Here, the Policy begins with a lengthy, detailed statement of the Policy's objective to avoid traditional court litigation and, in the next section, explains the Policy "is a waiver of all rights to a ***civil court action*** for a covered dispute..." Jt. Ex. 7, Amended Complaint, Ex. A, p. 1. As discussed in Respondent's exceptions brief, the Policy then repeatedly reemphasizes this purpose throughout the remainder of the Policy. Employees would certainly read the Policy provisions in light of these stated goals and understand the Policy aims to avoid traditional civil litigation, not to preclude Board and other administrative proceedings.

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[5] The General Counsel contends employees would question whether they can obtain relief through Board proceedings because the prohibition against court litigation arguably prohibits federal court actions to enforce Board orders. Again, legally unsophisticated employees unfamiliar with the intricacies of Board procedure would not be familiar with procedures to enforce Board orders. If the employee was familiar with the enforcement procedure, the employee would understand it is the Board, not the charging party, who files the lawsuit to enforce the order, and since the Board is not bound by the Policy, the Policy does not prohibit such enforcement actions.

C. Respondent's Business Justifications Far Outweigh Any Purported Infringement On Protected Rights.

1. Any Theoretical Impact On Protected Rights Is Slight, At Best.[6]

The GC erroneously contends the Policy's purported infringement on NLRB charges cannot be slight because NLRB charges play a central role in enforcing the Act's protections. This contention is plainly belied by *Boeing*. In *Boeing*, the Board purposefully instructed this step of the test assesses two separate aspects of a policy: (1) the importance of the protected right allegedly infringed upon **and** (2) the extent of the alleged impact, "recogniz[ing] those instances where the risk of intruding...is comparatively slight." *Boeing*, 365 NLRB No. 154, slip op. at 15.

Here, the Policy expressly excludes Board charges from its arbitration mandate and reiterates throughout that its objective is to avoid the perils of traditional court litigation, not to preclude Board charges. Equally important, even if it did preclude Board charges – which it expressly does not – the Policy preserves the functional purpose of Board charges by permitting employees to vindicate protected rights through arbitration. More specifically, Board charges serve as a mechanism to enforce employees' protected rights. However, even assuming the Policy restricts such filings, this does not mean NLRA violations will go unremediated. Rather, the Policy safeguards the function of Board charges by providing employees with an alternate forum for enforcing their rights – one that is just as expedient, if not more so, than Board proceedings.

In fact, both the Board and the United States Supreme Court have long held parties may agree to arbitrate most claims arising under the NLRA, and the Board will defer unfair labor practice charges to arbitration as a suitable venue to resolve labor disputes, *See, e.g., Ralph's Grocery*, 363 NLRB No. 128, slip op. at 6 (Member Miscimarra dissenting in part); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009) Accordingly, even if the Policy mandated arbitration of NLRA-claims, which it does not, this alternative forum is neither inferior to Board

[6] The General Counsel argues Respondent "tacitly" acknowledged the Policy infringes upon employees' right to file board charges. This is preposterously untrue. The section to which the General Counsel refers begins, "Even assuming the Policy could be reasonably interpreted to preclude employees from filing Board charges, a construction plainly belied by the Policy's unambiguous language..." See GC Br. at 11; Resp. Br. at 24.

proceedings, nor does it materially diminish employees' ability to adequately enforce their protected rights. Thus, any an purported infringement on protected rights is slight, at best.

2. The Policy Furthers Substantial Business Interests.

By contrast, as detailed in the Policy and Respondent's Brief, the Policy furthers substantial business interests that benefit employers and employees alike. Arbitration avoids crushingly expensive, extensively time-consuming, and often unnecessarily protracted litigation – facilitating substantially more expedient resolution of disputes and providing aggrieved employees with appropriate relief much sooner than courts can – while simultaneously preserving a fair and equitable means for resolving disputes before an impartial trier of fact.

3. The Policy's Business Justifications Outweigh Any Potential Theoretical Impact On Protected Rights.

The Policy furthers significant interests acutely relevant to both employers and employees by ensuring that employment disputes are fairly and expeditiously resolved while avoiding the burdens of traditional state or federal court litigation. The potential impact on protected activity, on the other hand, is minimal as the Policy's plain language not only expressly excludes Board charges from its mandates, but also provides employees with an alternative forum in which to vindicate NLRA-protected rights, a forum that is equally as effective and expeditious as Board proceedings. Accordingly, the Policy's business justifications greatly outweigh its potential and wholly theoretical impact on protected activity; thus, the Policy does not violate the Act.

The ALJ wholly failed to conduct this balancing test, relying instead on the lack of precedent applying the *Boeing* to mandatory arbitration policies. However, *Boeing* requires a fact-specific inquiry that depends on the facts of a case, not legal principles articulated in Board precedent. The ALJ's failure to conduct this balancing test is further evidenced by his failure to explain why, using the record facts, the business justifications did not outweigh the purported impact on protected rights. Moreover, the ALJ not only failed to balance these factors, but could not have adequately done so because he did not reopen the record to receive evidence of the

degree of impact on protected rights and the business justifications for the Policy. Rather, he limited his consideration to the incomplete, limited facts set forth in the stipulated record.

D. The ALJ Improperly Failed To Reopen The Record.

The GC argues that, despite the ALJ's failure to even address Respondent's request to reopen the record, Respondent has not made a sufficient showing to justify such an action. However, in making this argument, the GC relies on the wrong standard. Specifically, the GC asks the Board to apply the standard reserved for motions to reopen the record ***after*** the ALJ has issued the decision. Contrary to the GC's contentions, Respondent need not show the additional evidence would necessitate a different result, nor does Respondent need to articulate in detail the type of evidence it will proffer. Rather, Respondent need only show extraordinary circumstances justify reopening the record, ***briefly*** describe the nature of the evidence it intends to present, why it was not presented earlier and what result it would require if adduced and credited. Board's Rules and Regulations § 102.65(e)(1). Respondent did just that. Specifically, Respondent explained that, since stipulating to the record, the Board retroactively implemented a new standard that considered evidence not relevant under the prior standard, briefly described the evidence it intended to present, namely, "evidence of potential impact and business justifications underlying the policy," and explained this evidence would support dismissal of the Complaint "should the ALJ remain unconvinced for any reason." Resp. Br. on the Merits at 15-16. Accordingly, Respondent sufficiently justified the need to reopen the record, and the ALJ failed to grant or even consider this request.

III. CONCLUSION.

For the reasons detailed above, the Board should not adopt the ALJ's decision and should instead dismiss the allegations in the Amended Complaint.

DATED: April 11, 2018

EPSTEIN BECKER & GREEN, P.C.

By: _____
Adam C. Abrahms
Christina C. Rentz
ATTORNEYS FOR SAN RAFAEL
HEALTHCARE WELLNESS, LLC

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My business address is 1925 Century Park East, Suite 500, Los Angeles, CA 90067-2506.

3. I served copies of the following documents (specify the title of each document served):

RESPONDENT'S REPLY TO THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S EXCEPTIONS

4. I served the documents listed above in item 3 on the following persons at the addresses listed:

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5. a. ☐ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 4 and placed the envelope for collection and mailing on the date shown below, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Los Angeles, California.

b. ☐ **By overnight delivery.** I enclosed the documents on the date shown below in an envelope or package provided by an overnight delivery carrier and addressed to the person at the addresses in item 4. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

c. ☒ **By e-mail or electronic transmission.** I caused the documents to be sent on the date shown below to the e-mail addresses of the persons listed in item 4. I did not receive within a reasonable time after the transmission any electronic message or other indication that the transmission was unsuccessful.

6. I served the documents by the means described in item 5 on April 11, 2018.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

April 11, 2018 — DATE
Katrina Gorgy — (TYPE OR PRINT NAME)
(SIGNATURE OF DECLARANT)